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ENVIRONMENTAL PROTECTION  
LAND USE MANAGEMENT AND COMPLIANCE  
LAND USE REGULATION PROGRAM  
Freshwater Wetlands Protection Act Rules  
Coastal Permit Program Rules

Proposed Amendments: N.J.A.C. 7:7A-2.4, 5.7, 7.2, 10.6 and 13.3, N.J.A.C. 7:7-1.10

Proposed Repeal: N.J.A.C. 7:7A-7.3

Proposed New Rules: N.J.A.C. 7:7A-1.8

Authorized By: Robert C. Shinn, Jr., Commissioner, Department of Environmental Protection

Authority: N.J.S.A. 13:9B-1 et seq., N.J.S.A. 58:10A-1 et seq., N.J.S.A. 12:5-3, N.J.S.A. 13:19-1 et seq., and 13:9A-1 et seq.

Calendar reference: January 22, 2002; 34 N.J.R.

DEP Docket Number:

Proposal Number: PRN 2001-

**A public hearing on the proposal will be held as follows:**

Submit written comments by the close of business on February 21, 2002 to:

Janis Hoagland, Esq.  
Attn: DEP Docket Number  
Office of Legal Affairs  
New Jersey Department of Environmental Protection  
P.O. Box 402  
Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on 3½ inch diskettes as well as on paper. The Department will be able to upload the comments onto its office automation equipment and will avoid having to retype the comments. The Department will use the paper version of the comments to ensure that the uploading was accomplished successfully.

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Submittal of comments on diskette is not a requirement. The Department prefers Microsoft Word 6.0 or above; however, other word processing software that can also be read or used by Microsoft Word 6.0 is acceptable. MacIntosh formats should not be used.

The proposal can be viewed or downloaded on the Land Use Regulation Program website at <http://www.state.nj.us/dep/landuse>. A copy of the proposal is also available by e-mailing the Department at [lurweb@dep.state.nj.us](mailto:lurweb@dep.state.nj.us), or by calling the Department at (609) 984-3444.

The agency proposal follows:

### **Summary**

The Department of Environmental Protection (Department) is proposing amendments to the Freshwater Wetlands Protection Act (FWPA) rules, N.J.A.C. 7:7A, and to the Coastal Permit Program rules, N.J.A.C. 7:7 (coastal rules). These amendments address the issue of takings, the identification of threatened or endangered species habitat, and other miscellaneous changes necessitated by the takings amendments. This summary is therefore organized to first describe the amendments to the coastal and FWPA rules that address the taking issue, other miscellaneous amendments required by the takings amendments, including the application requirements for a practicable alternatives analysis. Subsequently, the summary addresses the amendments relating to habitat identification.

### **Takings**

In a recent decision by the Appellate Division of the Superior Court in East Cape May Associates v. NJDEP, 343 N.J. Super. 110 (App. Div. 2001), the Court held that the Department was required to adopt rules implementing section 22b of the FWPA (N.J.S.A.13:9B-22b). Section 22b provides the Department the option of modifying its permit action in response to a determination that the permit action constitutes a taking of property without just compensation. This option is an alternative to condemning the property or compensating the owner. These proposed amendments respond to the Court's ruling and remand for rulemaking.

The court in East Cape May held that the Department should provide further detail in its rules regarding the standards the Department would apply in determining whether and how to modify its action to avoid a taking. The court stated that the Department's rules need more specificity regarding when the Department will relax a regulatory requirement to avoid a taking rather than deny approval, and that the Department's rules must be fashioned to balance statutory goals and policies with the property owner's reasonable investment-backed expectations. The court noted that these standards were missing from the Department's freshwater wetlands rules.

While the East Cape May case dealt primarily with freshwater wetlands, the Court also spoke to the issue of takings under the Department's coastal rules. The East

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Cape May site was located in the coastal zone and was thus subject to regulation under N.J.A.C. 7:7 and 7:7E. However, the site was comprised entirely of freshwater wetlands and freshwater wetland transition areas. Therefore, the Court ruled that N.J.S.A.13:9B-22b (section 22(b)) applied to the site. Prior to the Appellate Division decision in the East Cape May case, the Department had adopted N.J.A.C. 7:7-1.10(c), which allows relaxation of the coastal rules to avoid extraordinary hardship and to provide a minimum beneficial use for a property, consistent with constitutional standards. This coastal rule was intended to address those rare situations where a minimum beneficial economically viable property use would not be provided through strict application of the coastal rules, including rules on beaches, dunes, and threatened and endangered species habitat. The Appellate Division was made aware of the adoption of N.J.A.C. 7:7-1.10(c) during its review of the East Cape May case, and stated in a footnote that N.J.A.C. 7:7-1.10(c) required more detail and standards. Therefore, this proposal includes changes to N.J.A.C. 7:7-1.10(c) as well as changes to the FWPA rules, to address the issue of the relaxation of coastal standards in order to provide a minimum beneficial economically viable use, and to ensure consistency between the rules.

A section-by-section description of the changes proposed to the coastal and freshwater wetlands rules to address the takings issue follows.

## N.J.A.C. 7:7 COASTAL PERMIT PROGRAM RULES

### SUBCHAPTER 1 GENERAL PROVISIONS

#### 7:7-1.3 Definitions

A definition is proposed for "property as a whole." This term is used and defined at existing N.J.A.C. 7:7-1.10(d)1. Because the proposed amendments would place the term in more than one subchapter, the definition is being moved to the definitions section (N.J.A.C. 7:7-1.3). In addition, minor clarifying amendments are proposed, including a change in the first sentence. The existing definition states that the property as a whole means "all property that was assembled as one investment or to further one development plan." However, the proposed rule does not include the words "that was," because they imply that the property as a whole includes only properties assembled at one point in the past, whereas the property as a whole also includes any properties added on over time. For example, if a person bought one lot in 1981, and then acquired an adjacent lot in 1982, the two lots together would constitute the property as a whole (assuming all other aspects of the definition also apply). The proposed definition is intended to be consistent with the existing case law on this issue.

#### 7:7-1.10 Construction and relaxation of procedures or standards

Existing N.J.A.C. 7:7-1.10 addresses the construction and relaxation of coastal standards. Amendments are proposed to N.J.A.C. 7:7A-1.10(c) to reorganize it, and to clarify the conditions under which the Department can relax the application of the standards in N.J.A.C. 7:7E to avoid a taking. Proposed N.J.A.C. 7:7-1.10(c) includes existing provisions allowing the Department to relax standards in cases where the

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applicant proves extraordinary hardship. The proposal deletes language implying that the applicant must always be the initiator of the relaxation of standards, so as to allow the Department to initiate the relaxation. It may be necessary in some cases for the Department to initiate a relaxation of the standards in those instances where strict application of the rules could cause a taking. For example, if the Department determines that an extraordinary hardship might likely exist, this would allow the Department to initiate the process, and to request the necessary information from the property owner so that this determination could be made without unnecessary delays.

The proposal also adds language at (c) to explicitly state that the Department may relax standards in response to a court finding that a Department permitting action would constitute a taking. Finally, a sentence is added clarifying that the Department shall not relax a standard until after a decision is made on the permit application under the rules as strictly applied. This is stated in existing N.J.A.C. 7:7-1.10(e)1 in relation to requests for relaxation, but this new proposed sentence will make clear that this applies in all cases, whether the Department is acting in response to a request for relaxation or is acting on its own initiative.

Proposed N.J.A.C. 7:7-1.10(d) includes language found in the second portion of existing N.J.A.C. 7:7-1.10(c), addressing the criteria that must be met for an extraordinary hardship to exist. As in proposed changes to (c), language limiting the ability to assert a hardship to the applicant is removed, so as to allow the Department, if necessary, to initiate the process of determining whether a hardship exists. In addition, the proposal deletes criteria that address the environmental impact of a project the Department might approve if a relaxation is granted, and relocates these criteria at proposed N.J.A.C. 7:7-1.10(h). Further, the definition of "property as a whole" is proposed to be relocated with other definitions at N.J.A.C. 7:7-1.3. This term is used and defined at existing N.J.A.C. 7:7-1.10(d)1. Because the proposed amendments would place the term in more than one subchapter, the definition is being moved to the definitions section.

Existing subsection (e) is proposed for deletion, and its substance is proposed to be relocated at N.J.A.C. 7:7-1.10(j), which is summarized below.

Proposed new N.J.A.C. 7:7-1.10(e) sets forth three factors the Department will consider in determining whether and to what extent to relax a standard, each of which is described in a separate subsection summarized below:

- The property owner's investments in the property, and the reasonableness of these investments;
- Potential uses for the property which would be economically viable; and
- The likely environmental impacts of any potential economically viable uses of the property.

Proposed new N.J.A.C. 7:7-1.10(f) sets forth the five factors the Department will consider in determining whether investments made in the property were reasonable.

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These factors are based on legal precedent and Department experience in past takings cases. First, the investment must have actually been incurred in pursuit of proposed development of the site. Planned investments will not be included. Second, the action for which the funds were expended must have been lawful at the time of the expenditure. For example, if the property owner violated Department rules by starting construction without the proper permits, the cost of defending against the Department's enforcement action would not be considered a reasonable investment. Third, the investment must relate to the specific property that is the subject of the coastal permit application and not to another property. Fourth, the investment must have been reasonable given the conditions existing at the time of the investment, which were relevant to the potential viability of the project. For example, if a property is undevelopable under local zoning, and necessary utilities are unavailable to the site, substantial investments made in pursuing a major development might not be considered reasonable. This provision ensures that a property owner has exercised due diligence in investigating development constraints prior to investing in the project, and prevents a windfall to a property owner who did not exercise due diligence or adequately investigate existing constraints prior to making an investment. Last, the proposed rule allows the consideration of any other factor that is related to the reasonableness of the investment and/or the proposed use of the property. The situations in which takings issues arise are varied, and can involve a wide variety of types of ownership, property histories, site conditions, and other relevant factors. This provision will allow the Department to consider any unusual factors that might be identified, if they are relevant to the reasonableness of the investment.

Proposed N.J.A.C. 7:7-1.10(g) addresses whether relaxation of a substantive standard would provide the property owner with an economically viable use for the property as a whole. Proposed (g)1 creates a presumption that any use that would provide a property with a value that is equal to, or greater than, the reasonable investment costs shall be presumed to be an economically viable use. Proposed (g)2 provides that, merely because a use diminishes the value or marketability of a property, does not result in a profit, or does not allow the property owner to recoup all investments in the property, this does not mean it is not an economically viable use. The purpose of a relaxation of standards is to ensure a minimum beneficial economically viable use of the property in accordance with constitutional standards and legal precedent construing these standards, not to provide a specific rate of return desired by a property owner.

Proposed N.J.A.C. 7:7-1.10(h) sets forth the factors the Department will consider in evaluating the potential environmental harm that might be caused by any economically viable uses identified under (g), and how that harm might be minimized or mitigated. In determining whether and/or how to relax a substantive standard, the Department must balance the economic interests of property owners against the environmental protection mandate of the coastal protection statutes which underlie the rules, which are CAFRA, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A. 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq. If a possible economically viable

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use would cause serious environmental impacts that are inconsistent with the policies and goals of the coastal protection statutes, the Department might consider approving some other use with fewer impacts, approving a use with impacts that could be easily mitigated, or buying or condemning the property. The concern here focuses on the functions provided by coastal resources. Proposed N.J.A.C. 7:7-1.10(h)3 through 5, which address specific aspects of the environmental goals of the coastal protection statutes, are relocated here from existing N.J.A.C. 7:7-1.10(c)2, 3, and 5.

Proposed new N.J.A.C. 7:7-1.10(i) includes provisions found in the existing rules at N.J.A.C. 7:7-1.10(e), addressing when a request for relaxation of substantive standards may be submitted. Under the existing rules, such a request could be submitted with a permit application (although the Department would not decide on the request until the application was decided on), or after receiving notice of a Department decision on an application. The proposal adds three additional points at which an applicant may request a relaxation: after the Commissioner's final decision at the conclusion of contested case proceedings in the Office of Administrative Law, after completion of all appeals of any such final decision, and after a court determination that a Department permit decision would result in a taking. These are consistent with similar proposed provisions in the freshwater wetlands rules, and would provide the applicant and the Department with more opportunities to seek to avoid lengthy and expensive litigation in Superior Court. The proposal also removes a deadline for submittal of such a request, found in existing N.J.A.C. 7:7-1.10(e)2, which required that, if the request were submitted after the permit decision, it must be submitted within the time for submittal of an adjudicatory hearing request. This deadline is proposed for deletion because it may have the unintended effect of causing some applicants to prematurely seek a relaxation of the rules, where relaxation may not be necessary and where a remedy under the rules as strictly applied may be available in the Office of Administrative Law. For the reasons discussed above, the Department believes that these issues should be handled at the earliest feasible stage in the permit appeal process. However, relaxation should be the exception, not the norm, and prior to any relaxation, it should be clear that relaxation is absolutely necessary.

Proposed N.J.A.C. 7:7-1.10(j) is recodified from existing N.J.A.C. 7:7-1.10(e), and sets forth the information required for a request for relaxation. The provision is reorganized somewhat to reduce confusion, and minor clarifications and changes to cross references are proposed. Some new requirements are added. First, to ensure that all property owners within 200 feet of the property have been identified and provided notice, N.J.A.C. 7:7-1.10(j)5iii requires submittal of a municipally certified list of all property owners within 200 feet of the property. This will also make the relaxation request submittal requirements consistent with other existing coastal permit application requirements. This new requirement has also been included at N.J.A.C. 7:7-1.10(e) in a recent proposal to readopt the coastal zone management rules at N.J.A.C. 7:7E and to make related amendments to the coastal permit program rules. Second, N.J.A.C. 7:7-1.10(j)7 requires submittal of a copy of a court takings decision if the relaxation request is based on such a decision. Third, the requirement that the property owner keep offers

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for sale of the property open for 180 days is proposed to be reduced to 60 days. This more accurately reflects the amount of time required for an interested party to make an offer for the property, and will prevent delays in the process.

Finally, a requirement is added at (j)8 that the request include documentation that the property owner has concluded all appeals of the Department's decision on the coastal permit application. Because relaxation requests may be submitted at many different stages in the process of seeking a coastal permit, the request will not be deemed complete until it includes evidence of the last of several possible triggering events. If an application is denied and the applicant appeals in the Office of Administrative Law (OAL), it would be inappropriate for the Department to begin review of a relaxation request when the applicant might obtain relief through the OAL appeal, thus rendering the relaxation request superfluous. The events that can trigger the start of the 90 day period for the Department to take action on a relaxation request are listed at proposed N.J.A.C. 7:7-1.10(j)8i through iii. They include the date of the Department decision on the initial coastal permit application, the issuance of a final decision by the Commissioner after OAL proceedings on the coastal permit application, and the disposition of any appeals of the Commissioner's decision. For example, if an appeal is filed in the OAL, the relaxation request would be considered complete when it includes a copy of the Commissioner's final decision after conclusion of the OAL proceedings. However, if an appeal of the Commissioner's final decision were filed, the request would not be complete until final disposition of all further appeals. This provision will ensure that the Department responds promptly to a relaxation request, but also allows for the completion of other processes that may affect whether relaxation is in fact required.

Proposed new N.J.A.C. 7:7-1.10(k) sets forth the time frame in which the Department must respond to a request for a relaxation. The Department has 90 days to respond to such a request, counted from the date the request is complete.

Proposed new N.J.A.C. 7:7-1.10(l) provides that if the Department decides to relax substantive standards on its own initiative without the submittal of a request for relaxation, the Department must provide notice of its intent to do so in the same manner as the Department would provide notice of its intent to settle an appeal under N.J.A.C. 7:7-5.4. If the Department issues an approval for development based on a relaxation of substantive standards, the Department must provide notice of the approval, again in the same manner that notice would be provided of a final settlement. This provision covers only situations where the Department initiates the relaxation process. In cases where a property owner submits a request for relaxation, public notice will be provided through the requirements for a written offer of sale at N.J.A.C. 7:7-1.10(j)5 and 6. Proposed N.J.A.C. 7:7-1.10(l) will ensure that any decision by the Department to initiate relaxation of a substantive standard will be conducted with public notice and an opportunity for public comment.

Proposed new (m) provides that any development allowed based on a relaxation of substantive standards of N.J.A.C. 7:7E must meet at least two requirements. It must be

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the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards, and any portion of the property as a whole that is not authorized for development must be protected from future development through a conservation restriction. These limits are found in existing N.J.A.C. 7:7-1.10(c)6 and 7, and will ensure that the provisions for relaxation of substantive standards will be strictly limited and will not result in undue environmental impacts.

## SUBCHAPTER 4 PERMIT REVIEW PROCEDURE

### 7:7-4.2 Application contents

Proposed new N.J.A.C. 7:7-4.2(g) and (h) provides that an applicant who must examine alternatives as part of the application shall provide information on the acquisition history of the property as a whole, and on previous investments in the property as a whole. This will allow the Department to better determine whether there are practicable alternatives to a proposed project, by providing information related to the cost of pursuing other alternatives. In some cases, a close examination of alternatives may enable applicants to avoid initiating the relaxation process under proposed N.J.A.C. 7:7-1.10.

Proposed new N.J.A.C. 7:7-4.2(g) lists the types of applications that will be required to include acquisition history information. Each of the listed rules bases the decision as to whether to allow a development on an analysis of alternatives. For example, under the dune rule at N.J.A.C. 7:7-3.16(b), development is prohibited on a dune unless (among other conditions), the development has no practicable or feasible alternative in an area other than a dune.

The information required at proposed new N.J.A.C. 7:7-4.2(h) includes information about the environmental impacts of the project, other possible alternatives, and information that will allow the Department to obtain complete information regarding the costs of various alternative. Acquisition history of the property, and the feasibility of selling the property, are both relevant to the question of whether the cost of a particular alternative would be so prohibitively high as to render the alternative not practicable.

## N.J.A.C. 7:7A FRESHWATER WETLANDS PROTECTION ACT RULES

### SUBCHAPTER 1 GENERAL INFORMATION

#### 7:7A-1.4 Definitions

A definition is proposed for "property as a whole." This term is used in the takings provisions of the existing rules and is defined in the existing rules at N.J.A.C. 7:7A-7.3(d). Because the amendments would place the term in more than one subchapter, the definition is being moved to the definitions section (N.J.A.C. 7:7A-1.4). In addition, minor clarifying amendments are proposed, including a change in the first sentence. The first sentence of the existing definition states that the property as a whole means



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"all property that was assembled as one investment or to further one development plan." However, the proposed rule does not include the words "that was," because they imply that the property as a whole includes only properties assembled at one point in the past, whereas the property as a whole also includes any properties added on over time. For example, if a person bought one lot in 1981, and then acquired an adjacent lot in 1982, the two lots together would constitute the property as a whole (assuming all other aspects of the definition also apply). The proposed definition is intended to be consistent with the existing case law on this issue.

#### 7:7A-1.8 Determination of a taking of property

Proposed new N.J.A.C. 7:7A-1.8 contains provisions relating to takings assertions. These are similar to provisions found at existing N.J.A.C. 7:7A-7.3, but differ in two significant ways. First, the proposed provisions are much more detailed, as described below. Second, the provisions have been relocated from the public interest test to a separate section, in order to ensure that all applications are thoroughly analyzed initially under the rule's standard requirements, so that the takings issue will not be raised prematurely, before the application has been completely reviewed under those standard requirements.

Proposed new N.J.A.C. 7:7A-1.8(a) includes provisions found in the FWPA at N.J.S.A.13:9B-22b, which provide that if a court finds that a Department decision on a permit would result in a taking of property without just compensation, the Department may choose one of three options. The Department may compensate the property owner, condemn the property, or modify its previous action in order to avoid the taking, for example by relaxing a substantive requirement of the rules.

The corresponding coastal rule provisions at N.J.A.C. 7:7-1.10 refer to whether the Department will "relax substantive standards," whereas the freshwater wetlands provisions address whether the Department will "modify its action." This difference in terminology reflects the fact that the coastal rule has historically used the terminology of relaxing standards, so this terminology is retained in the coastal rules in order to avoid confusion. However, the FWPA speaks in terms of the Department modifying its action, so this language is used in the FWPA rules. However, in both provisions, the factors to be considered in assessing economically viable uses for the property as a whole are the same.

Proposed new N.J.A.C. 7:7A-1.8(b), which sets forth the factors the Department will consider in determining whether and how to modify its action to avoid a taking, is identical to proposed N.J.A.C. 7:7-1.10(e). These factors focus on three areas, each described in a separate subsection which is summarized below:

- The property owner's investments in the property, and the reasonableness of these investments;
- Potential uses for the property which would be economically viable; and
- The likely environmental impacts of any potential economically viable uses of the property.

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Proposed N.J.A.C. 7:7A-1.8(c), which sets forth the factors the Department will consider in determining whether investments made in the property were reasonable, is identical to proposed N.J.A.C. 7:7-1.10(f), which is summarized above.

Proposed N.J.A.C. 7:7A-1.8(d), which addresses whether modifying the Department's permit action would provide the property owner with an economically viable use for the property as a whole, is identical to proposed N.J.A.C. 7:7-1.10(g) (which is summarized above), except that the terminology for the action the Department might take is different, as discussed above.

Proposed N.J.A.C. 7:7A-1.8(e) sets forth the factors the Department will consider in evaluating the potential environmental harm that might be caused by any economically viable uses identified under (d), and how that harm might be minimized or mitigated. In determining whether and/or how to modify its action, the Department must balance the economic interests of property owners against the environmental protection mandate of the FWPA. If a possible economically viable use would cause severe environmental impacts that are inconsistent with the goals of the FWPA, the Department might consider approving some other use with fewer impacts, approving a use with impacts that could be easily mitigated, or buying or condemning the property. The concern here focuses on the functions provided by freshwater wetlands, transition areas, and State open waters. Proposed N.J.A.C. 7:7A-1.8(e) is similar to proposed N.J.A.C. 7:7-1.10(h), which is summarized above.

Proposed new N.J.A.C. 7:7A-1.8(f) addresses when a request for the Department to modify its permit action may be submitted. This provision is substantively the same as proposed N.J.A.C. 7:7-1.10(i), described above, and provides the applicant and the Department with many opportunities to seek to avoid lengthy and expensive litigation in Superior Court.

Proposed new N.J.A.C. 7:7A-1.8(g) sets forth the required contents of a request for the Department to modify its action or inaction concerning a property so as to minimize the detrimental effect to the value of the property under N.J.A.C. 7:7A-1.8(a)3. This includes the information required to assert a taking under existing N.J.A.C. 7:7A-7.3(e). However, some changes and additions are proposed. The provision is reorganized and reworded slightly for clarity. A requirement is added at N.J.A.C. 7:7A-1.8(g)4iii for a municipally certified list of property owners within 200 feet of the property as a whole. This will ensure that all property owners within 200 feet of the property have been identified and provided notice, and will make the submittal requirements for a request for a modification of a Department permit action consistent with the requirements for requesting a relaxation of substantive standards under the coastal permit program rules. In addition, the requirement that the property owner keep offers for sale of the property open for 180 days is proposed to be reduced to 60 days under N.J.A.C. 7:7A-1.8(g)5i. This more accurately reflects the amount of time required for an interested party to make an offer for the property, and will prevent delays in the process. A new provision,

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N.J.A.C. 7:7A-1.8(g)9, requires submittal of a copy of a court takings decision if the request for a modification is based on such a decision.

Finally, a requirement is added at N.J.A.C. 7:7A-1.8(g)10 that the request include documentation that the property owner has concluded all appeals of the Department's decision on the coastal permit application. Because a request for a modification of a Department action may be submitted at many different stages in the process of seeking a coastal permit, the request will not be deemed complete until it includes evidence of the last of several possible triggering events. If an application is denied and the applicant appeals in the Office of Administrative Law (OAL), it would be inappropriate for the Department to begin review of a request for modification of a Department action when the applicant might obtain relief through the OAL appeal, thus rendering the request for modification superfluous. The events that can trigger the start of the 90 day period for the Department to take action on such a request are listed at proposed N.J.A.C. 7:7A-1.8(g)10i through iii. They include the date of the Department decision on the freshwater wetlands permit application, the issuance of a final decision by the Commissioner after OAL proceedings on the freshwater wetlands permit application, and the disposition of any appeals of the Commissioner's decision. For example, if an appeal is filed in the OAL, the request for modification of a Department permit action would be considered complete when it includes a copy of the Commissioner's final decision concluding the OAL proceedings. However, if an appeal of the Commissioner's final decision were filed, the request would not be complete until final disposition of all further appeals. This provision will ensure that the Department responds promptly to a request for modification of a Department permit action, but also allows for the completion of other processes that may affect whether such a modification is in fact required.

Proposed new N.J.A.C. 7:7A-1.8(h) provides that the Department may modify its action concerning a permit on its own initiative or in response to a request from a property owner. The second sentence of proposed N.J.A.C. 7:7A-1.8(h) sets forth a 90 day time frame in which the Department must respond to a request for a modification of a permit action or inaction. This sentence is substantively the same as N.J.A.C. 7:7-1.10(k), which is described above.

Proposed new N.J.A.C. 7:7A-1.8(i) provides that if the Department initiates a modification of a permit action on its own initiative without the submittal of a request for such modification, the Department must provide notice of its intent to modify the permit action in the same manner as the Department would provide notice of a possible settlement of an appeal under N.J.A.C. 7:7A-1.7(h)2. Further, if the Department issues an approval based on a modification of a permit action made on its own initiative, the Department must provide notice of the approval, again in the same manner that notice would be provided of a settlement. This provision covers only situations where the Department initiates the modification process. In cases where a property owner submits a request for modification of a permit action or inaction, public notice will be provided through the offer of sale requirements at N.J.A.C. 7:7A-1.8(g)3 and 4.

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Proposed N.J.A.C. 7:7A-1.8(i) will ensure that any decision by the Department to initiate modification of a permit action will be conducted with public notice and an opportunity for public comment.

Proposed new N.J.A.C. 7:7A-1.8(j) provides that any development allowed based on a modification of a permit action or inaction under this section must meet two minimum requirements. It must be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards, and any portion of the property as a whole that is not so authorized for development will be protected from future development through a conservation restriction. These limits are included to ensure that the provisions for modification of a permit action or inaction will be strictly limited and will not result in undue environmental impacts.

## SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

### 7:7A-7.2 Standard requirements for all individual permits

Existing N.J.A.C. 7:7A-7.2(b)12viii, which cross references takings provisions at existing N.J.A.C. 7:7A-7.3, is proposed for deletion, since the takings provisions have been relocated to N.J.A.C. 7:7A-1.8.

Proposed new N.J.A.C. 7:7A-7.2(c)3 emphasizes that the Department may consider the acquisition history of a property, and the property owner's investment in the property, when considering costs in the context of what is a practicable alternative. This will ensure that the Department can obtain complete information on this key issue before making a final permitting decision.

The proposal deletes existing N.J.A.C. 7:7A-7.3, which details the information that must be submitted as part of an application when the applicant wishes to assert that a taking will occur. Much of this information relates to costs, and is necessary for the Department to evaluate whether there is a practicable alternative to the project as proposed. Therefore, some of the substance of the provision is relocated in the subchapter addressing application contents at N.J.A.C. 7:7A-10.6(b), except that the definition of "property as a whole" is relocated in the definitions section at N.J.A.C. 7:7A-1.4.

## SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

### 7:7A-10.5 Additional application requirements for an individual transition area waiver

Proposed new N.J.A.C. 7:7A-10.5(b) sets forth a requirement that an applicant for a hardship transition area waiver submit the information required for an individual freshwater wetlands permit regarding the acquisition history of a property. This information will assist the Department in evaluating whether the applicant meets the

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requirements at N.J.A.C. 7:7A-10.5(a) for a hardship waiver. In some cases, use of the hardship waiver may enable applicants to avoid initiating the takings process under proposed N.J.A.C. 7:7A-1.8.

#### 7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

The provisions located in the existing rules at N.J.A.C. 7:7A-7.3(e)1 through 6, detailing information that must be submitted to assert that a Department permitting action could cause a taking as a part of a public interest review, are proposed to be deleted. More general provisions that allow the Department to require this type of information are proposed in the application provisions at proposed new N.J.A.C. 7:7A-10.6(b)2 and 3. Provisions describing the requirements for an alternatives analysis at existing N.J.A.C. 7:7A-10.6(a)7 are proposed for deletion because their substance is included in proposed new N.J.A.C. 7:7A-10.6(b)1.

Proposed new N.J.A.C. 7:7A-10.6(b) sets forth the types of information that will be required by the individual permit application checklist for the portion of the application that addresses the alternatives analysis. This information will be similar to the information required under the existing rule to assert a taking, including information on costs and property acquisition, as well as on the "no build" alternative. This information is important to the evaluation of whether there are practicable alternatives to a proposed project, and is relevant to the question of whether an alternative is "capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes," in accordance with N.J.A.C. 7:7A-7.2(c)1. However, rather than detail all of the information, the rule follows the scheme found in the rest of the chapter and describes the broad categories of information that will be required. The application checklist will then require only as much information as is needed for the particular type of application. For example, an individual permit application for a single family home might not require the same information relating to alternatives as would be needed for an application for a 500 unit development.

### **Landscape mapping of threatened or endangered wildlife species habitat**

The amendment summarized below relates to the Department's recently developed Landscape Project methodology for determining areas used as habitat by threatened or endangered wildlife species.

## **SUBCHAPTER 2 APPLICABILITY**

### 7:7A-2.4 Classification of freshwater wetlands by resource value

Additions are proposed at N.J.A.C. 7:7A-2.4(c), which provide that, for the purposes of resource value classification of freshwater wetlands, the Department shall identify threatened or endangered wildlife species habitat using the Landscape Project method,

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which is described below. When a sighting of a threatened or endangered species is recorded, the Department must decide the size and shape of the area surrounding the sighting that is likely to be used as habitat by the species sighted. When a member of a wildlife species is seen, other members of the species also must be present or must have been present recently, because that individual animal was produced by a family grouping, and the family grouping must be part of a larger population of that wildlife species in order for the species to survive and for that individual to be detected. Therefore, to effectively ensure the survival of a wildlife species, the protected habitat area must include not only the area that will be used by the individual animal sighted, but also by the members of its family and the local population of that species. The existing freshwater wetlands rules do not specifically address how the Department determines which areas are considered threatened or endangered species habitat. However, this is covered in detail in the Department's freshwater wetlands technical manual. The Department is presently working to update the technical manual to incorporate the Landscape Project method. Therefore, proposed N.J.A.C. 7:7A-2.4(c) refers the reader to the freshwater wetlands technical manual for detailed information regarding the Department's identification of threatened or endangered wildlife species habitat. This applies only to animal species. Threatened or endangered plant species habitat will continue to be identified using the existing system, which is set forth in the technical manual.

In the early 1990's the Division of Fish and Wildlife's Endangered and Nongame Species Program (ENSP) began work on a strategic plan for the long-term protection of endangered and threatened species in New Jersey. During the planning process biologists realized that the current system for protecting endangered and threatened species could be improved in terms of data collection, compilation, mapping and distribution and that this improvement would enhance the Department's ability to protect these species over the long term.

The current system focuses on protecting individual sites as they become threatened by proposed development. This protection is based on known locations of endangered and threatened species as they are recorded in the Natural Heritage Program's Biological Conservation Database (BCD) or species and habitats otherwise identified by permit applicants. Specific habitat locations identified in the database as polygons and their associated buffer are considered an endangered or threatened wildlife species habitat and thus subject to this rule. Furthermore, all proposed development areas are evaluated to determine suitability as endangered or threatened species habitat and may also be subject to this rule. The Department has determined that this site-by-site approach does not protect the large, contiguous blocks of habitat needed by many endangered and threatened species. For many endangered and threatened species, habitat fragmentation results in increased levels of predation, competition from edge species and increased disturbance. Habitat alterations and loss caused by fragmentation may eventually reduce populations to dangerously low levels and may isolate them. Either of these results can lead to population instability and local extinction, especially in less mobile species.

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Since many animals require large expanses of natural habitat for their long-term viability, the Division of Fish and Wildlife's ENSP began developing the Landscape Project in 1994. The Landscape Project focuses on large areas called landscape regions, which are ecologically similar with regard to plant and animal communities. The ENSP identified and mapped habitat for endangered and threatened species within each landscape region (Piedmont Plains, Skylands, Delaware Bay, Pinelands and Atlantic Coastal). This mapping initiative described below is based on extensive databases of endangered and threatened species locations and land use/land cover data.

It is widely accepted that protected areas such as state and national parks are often not sufficient to protect viable populations of endangered and threatened species and biological diversity as a whole. Advances in the field of conservation biology and landscape ecology have recognized the need for protecting large expanses of habitat as a means of effectively conserving biological diversity in the face of rapid human population growth and habitat fragmentation. The Landscape Project was developed to identify endangered and threatened species wildlife habitats that need protection to maintain these species populations over the long term.

The Landscape Project was developed to provide state of the art mapping of endangered and threatened wildlife species habitat in New Jersey. This mapping will assist the Department and the regulated community in identifying areas that are considered endangered and threatened wildlife species habitat. The Landscape Project has undergone several peer reviews and the Department believes that this approach best depicts endangered or threatened wildlife species habitat in New Jersey.

The method for delineating endangered and threatened species habitat is a multi-step process. First, the relevant classes for each habitat type (forest, grassland, forested wetland, emergent wetland and beach/dune) were extracted from a satellite derived land use/land cover data layer. This data set was produced by the Rutgers University Center for Remote Sensing and Spatial Analysis by classifying 1995 Landsat Thematic Mapper imagery using a combination of computer classification approaches. Additional GIS data were used in the classification process as either pre-classification stratification or post-classification modification. For example, US Fish and Wildlife Service National Wetland Inventory, New Jersey Department of Environmental Protection Freshwater Wetlands and Natural Resource Conservation Service county soils data were used in the wetlands classification. The final land cover map includes 40 different classes of cover/habitat types. The minimum mapping unit is approximately 0.5 acres. A detailed description of the land use/land cover data and mapping process can be found in "The Landscape Project", available at the New Jersey Division of Fish and Wildlife website ([www.njfishandwildlife.com](http://www.njfishandwildlife.com)). A hard copy of the publication can be obtained for a fee by contacting the New Jersey Division of Fish and Wildlife, P.O. Box 400, Trenton, NJ 08625-0400.

In the next step in the mapping process, boundaries between habitat types and major roads (500 level county roads and above, since these roadways represent significant, identifiable boundaries between habitat areas) were used to delineate contiguous patches for each habitat type.

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Literature reviews were conducted for each of the listed endangered and threatened species in order to develop models that are applied to each of the species location records in the Natural Heritage Database. The models are based on the current scientific literature available for the species and consider life history characteristics such as habitat preference and home range size. Endangered or threatened species location data were then intersected with the habitat patches, using appropriate models for each species to interpret the location data. Patches that contain records of endangered or threatened species are designated as endangered or threatened species habitat. The vast majority of the species data used in the mapping were derived from the Natural Heritage Program's Database. Gaps in this information were identified and additional endangered and threatened species surveys were conducted in areas that had suitable habitat but were not previously surveyed. All endangered and threatened species location records resulting from these surveys and used in creating the Landscape Maps are in the process of being entered into the Natural Heritage Database.

The contiguous patches for each habitat type were then classified based on the conservation status of species present. The highest rank (5) was assigned to habitat patches with Federally endangered or threatened species; the rank of (4) was assigned to State endangered wildlife species; the rank of (3) was assigned to State threatened wildlife species. To be included in ranks (2) and (1) parcels were required to meet minimum size criteria. The minimum size for forest and grassland habitat types is 10 hectares (100,000 square meters or 24.71 acres) of core habitat while wetlands (emergent and forested) and beach/dune habitat types do not have a minimum size. Habitat patches not meeting the minimum size criteria were eliminated from inclusion in rank (1) and (2) areas. The rank of (2) was assigned to parcels containing occurrences (using applicable models) of non-listed State priority species (these are species of statewide or regional concern that are not currently listed). The rank of (1) was assigned to habitat patches that met the minimum size requirement. For the purposes of identifying endangered or threatened wildlife species habitat under the FWPA rules, habitat patches ranked as 5, 4 and 3 shall be utilized. The main difference between the current and proposed approach for defining endangered or threatened wildlife species habitat is how the occurrences and sightings are interpreted and geographically mapped. Therefore, the actual application of the rules to specific development proposals is not expected to change in a significant way.

The Department proposes to incorporate this new method for identifying endangered or threatened wildlife species habitat into the freshwater wetlands technical manual. This proactive mapping approach will allow the Department to provide information on known endangered and threatened species habitat to prospective permit applicants prior to the preparation of coastal permit applications. In this way, the information can be incorporated into the permit application for use in addressing compliance with the rule. This process will provide a greater level of predictability regarding the Department's determination of endangered and threatened species habitat for specific areas, and will reduce the level of consulting services needed to prepare the permit application, specifically habitat assessments and impact analyses. In addition, since the mapping more clearly defines the location of suitable habitats, the need to conduct costly surveys to evaluate areas that are not mapped as habitat will be significantly



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reduced. Currently, regulatory issues related to endangered and threatened species habitats often require lengthy exchanges of information, including survey data and habitat mapping, between permit applicants and Department staff. Through the use of Landscape Mapping, the permit application review process will be simplified and the associated review time should also be reduced. In addition, permit applicants can dispute the Department's mapping or to demonstrate that a proposed development will not result in an adverse impact to the endangered or threatened wildlife species habitat.

Furthermore, the Landscape Project mapping will reduce the time and effort required for permit applications and reviews. The need for consulting services and costly surveys to determine the presence of threatened or endangered wildlife species will be significantly reduced because the mapping more accurately identifies areas that would be suitable habitats for such species. Currently, application reviews involving issues related to endangered and threatened wildlife species habitats often require lengthy exchanges of information between permit applicants and Department staff, including survey data and habitat mapping. Through the use of Landscape Project mapping, the application review process will be simplified and the associated review time will also be reduced. Finally, should an applicant disagree with the classification of an area as threatened or endangered wildlife species habitat, existing provisions in the freshwater wetlands rules (at N.J.A.C. 7:7A-2.4(c)) provide the applicant the option of demonstrating that an area designated as threatened or endangered species habitat is no longer suitable for use by that wildlife species.

The proposed use of the Landscape Project mapping is expected to result in the classification as threatened or endangered species habitat of some areas that are currently not classified as such, and the declassification of other areas currently classified as threatened or endangered wildlife species habitat. Overall, there will likely be a moderate increase in the total acreage identified as threatened or endangered wildlife species habitat in New Jersey. However, the Department believes that the Landscape Project mapping represents the best science on endangered or threatened wildlife in New Jersey, and is superior to the older system currently used by the Department.

For more information on the Landscape Project method, and a listing of the research used in developing the method, contact the Department's Division of Fish and Wildlife through their website at [www.state.nj.us/dep/fgw](http://www.state.nj.us/dep/fgw). A CD containing the maps showing the areas in New Jersey identified to date as threatened or endangered wildlife species habitat can be purchased for a small fee from the Department's Office of Maps and Publications at (609) 777-1038. In addition, a complete paper copy of the statewide maps has been provided to all county clerks and county libraries for use by the public. The Department anticipates providing the maps on its website by fall of 2002.

### Social Impact

The social impact of the proposed amendments to address takings will be positive. The amendments provide a logical and more predictable process in both the coastal and the freshwater wetlands rules for addressing an applicant's assertion that a

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Department action will result in an unconstitutional taking or impermissible restriction on development of property. By providing detail concerning the process the Department will follow in accepting and evaluating such assertions, and standards the Department will apply in determining whether and how to modify a Department action to avoid a taking, the amendments will aid the public in its interactions with the Department around the takings issue. Further, the amendments will enable the Department to comply with the court's remand order in East Cape May Assoc. v. DEP, 343 N.J. Super. 110 (App. Div. 2001).

The proposed amendments to the application requirements at N.J.A.C. 7:7A-10.5 and 10.6 will have a positive social impact. These amendments allow the Department to require information regarding the cost and acquisition history of a property as part of an individual freshwater wetlands permit application. This additional information will enable the Department to better evaluate possible alternatives to proposed projects, resulting in a better decision making process overall.

The social impact of the Landscape Project method for identifying threatened or endangered wildlife species habitat will also be positive. The Landscape Project method improves the Department's identification of such habitat to reflect updated scientific information and methodologies. Because the existing circles used as a starting point for identifying threatened or endangered species habitat are based solely on the distance from a species sighting, they often include areas that are clearly unsuitable habitat, such as parking lots. Because the boundaries of the patches used under the Landscape Project method are based not merely on distance from a sighting but also on vegetation and/or natural features, less effort will be spent in investigating unsuitable areas for threatened or endangered wildlife species. Further, the Landscape Project mapping lends itself to use by the public, which will allow for threatened or endangered wildlife species information to be used in the early stages of project planning and site acquisition, thus saving time and money for applicants and the Department.

### Economic Impact

The economic impact of the proposed takings amendments to both the coastal and FWPA rules will be minor. The proposed takings provisions are likely to have a slight positive economic impact, in that they will provide a consistent and more predictable process for addressing takings issues. This process is likely to reduce the cost of pursuing, addressing, and sometimes litigating takings issues, for both the Department and applicants.

The use of the Landscape Project method of identifying threatened or endangered wildlife species habitat may have a slight negative economic impact on some persons who want to develop property containing wetlands near sightings of threatened or endangered wildlife species, because some areas currently not identified as threatened or endangered habitat will be identified as such using the Landscape Project method. However, because some properties currently classified as threatened or endangered habitat will be declassified under the Landscape Project method, a slight positive

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economic impact will result for some other property owners. Overall, it is likely that somewhat more areas will become classified as threatened or endangered wildlife species habitat, than will be declassified. However, any economic impact that results from this is offset by the public interest in protecting the remaining members of these dwindling species.

### Environmental Impact

The proposed takings amendments, in both the coastal and freshwater wetlands rules, are not likely to have a direct environmental impact as the amendments are intended to provide a method for identifying viable property uses with minimized environmental impacts. However, by providing for an efficient, predictable process for dealing with takings assertions, the rules will reduce Department effort expended on these issues, thus freeing Department staff to focus on other important environmental matters.

The Landscape Project method for identifying threatened or endangered wildlife species habitat will have a positive environmental impact. The use of the Landscape Project method will more accurately determine areas used by these species. This means the Department's resources will be better focused on protecting habitat, and will not be expended on areas not used by threatened or endangered wildlife species.

### Federal Standards Analysis

Executive Order No. 27 (1994) and P.L. 1995, c.65 (amending N.J.S.A. 52:14B-1 et seq.) require that State agencies that adopt, re-adopt or amend State rules include a statement as to whether the rule contains any standards or requirements which exceed those imposed by Federal law.

The proposed amendments to the Coastal Permit Program Rules do not exceed Federal law because there is no corresponding Federal law. The Federal Coastal Zone Management Act (P.L. 92-583) was signed into law on October 27, 1972. The Act does not set specific regulatory standards for development in the coastal zone; rather, it provides broad guidelines for states developing coastal management programs. These guidelines are found at 15 C.F.R. 923. The guidelines do not specifically address the review standards that should be applied to new coastal development in order to preserve and protect coastal resources and to concentrate the pattern of coastal development. They simply provide a planning and management process, without establishing development standards for development in the coastal area. Therefore, the proposed amendments do not exceed any federal standards or requirements.

The proposed takings amendments to the Freshwater Wetlands Protection Act rules are consistent with Executive Order 12360 (1988), which applies to the Section 404 permitting process. This E.O. requires Federal agencies to evaluate the potential for their permitting actions to cause unintended takings, and to ensure that their actions restricting property use do so only to the extent necessary, consistent with Federal legal authority. The proposed new application requirements for practicable alternatives may exceed the ACOE's application requirements in some cases, but the provisions are

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needed to ensure that this key issue is thoroughly explored by the applicant and the Department during the permitting process.

The Landscape Project method for identifying threatened or endangered wildlife species habitat is not more stringent than corresponding Federal law. First, New Jersey has its own State list of threatened and endangered species, which includes not only wildlife species listed by the Federal government, but many more. For wildlife species listed only at the State level, there is of course no corresponding Federal method of identifying habitat. There are five wildlife species listed as threatened or endangered by both the State and Federal governments that are active in New Jersey – bog turtle, bald eagle, Indiana bat, piping plover, and dwarf wedgemussel. New Jersey has been designated as the lead agency in identifying bald eagle habitat, so the Federal agency responsible for identifying such habitat, the United States Fish and Wildlife Service (USFWS), defers to New Jersey in this area, thus ensuring that the State standard is not more stringent than the Federal standard.

For the remaining four New Jersey wildlife species listed on the Federal level as threatened or endangered, the Federal method of identifying habitat is similar to the State system in place heretofore. Based on a species sighting, the USFWS draws a circle around the sighting. The size of the circle is based on literature and data regarding the habitat needs and range of movement of the wildlife species, and takes into account the fact that habitat must be large enough to support not only the sighted individual, but also the local population of which the individual is a member. The USFWS then inspects the area within the circle to ensure that the area is in fact suitable habitat, and to identify any areas that might not be suitable habitat, for example, where development has already occurred.

There are two main differences between the Landscape Project method and the Federal method. First, the Landscape Project method is proactive, in that it identifies threatened or endangered wildlife species habitat prior to the submittal of an application for development. This is neither more nor less stringent than the Federal method, but it will provide many benefits not provided by the Federal method, as discussed above.

Second, the Landscape Project method shifts the emphasis somewhat, from protecting habitat needed primarily by the sighted individual, to protecting habitat needed for the survival of the local population of which the sighted individual is a member. Although the Federal method recognizes this local population and takes its habitat needs into consideration to some extent, the Landscape Project method give this greater emphasis. This reflects the fact that, in order to preserve a wildlife species over the long term, habitat must be provided not only for isolated individuals, but for a larger group that will breed and perpetuate the species.

This recognition of the importance of the local population may result in a somewhat greater amount of land being classified as threatened or endangered wildlife species habitat under the Landscape Project method than would be classified under the Federal method. However, use of the Landscape Project will also mean that the Department will not classify as threatened or endangered wildlife species habitat some areas that would be so classified under the Federal method. The benefits of the protection of threatened

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or endangered wildlife species and the general preservation of biodiversity are well recognized, and are reflected in the strong protection these species are afforded at both the national and State levels. While the net result of applying the Landscape Project method will likely be some increase in areas classified as threatened or endangered wildlife species habitat, this is outweighed by the greater accuracy of the Landscape Project method and thus its ability to more effectively provide the benefits that arise from protection of threatened or endangered wildlife.

#### [Jobs Impact](#)

The Department does not anticipate that the proposed amendments will have any noticeable effect on employment. The amendments addressing takings are not likely to affect the amount of development in New Jersey, although they may slightly reduce the amount of time and effort expended by both the public and the Department in the administrative process of wetlands permitting. The use of the Landscape Project method for identifying threatened or endangered wildlife species habitat may affect employment slightly by reducing the need for consulting services to determine whether an area is habitat for threatened or endangered wildlife species, but this is not expected to be a significant impact. Assuming the Landscape Project method results in a slight reduction of development in wetlands, this development is likely to be relocated to upland areas and thus not to affect employment. Thus, the Department believes that any impact of these proposed amendments on employment will be negligible.

#### [Agriculture Industry Impact](#)

Since ongoing farming, ranching and silviculture are exempt from the rules, and few new farms are being established in New Jersey, the proposed amendments will affect development activities only and are not likely to have any measurable effect on agriculture.

#### [Regulatory Flexibility Analysis](#)

In accordance with the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that, although these amendments will affect a fairly small number of persons, a significant number of those builders and property owners that may be affected by the proposed amendments are "small businesses" as defined by the Regulatory Flexibility Act. The FWPA rules apply to any person owning property containing freshwater wetlands, State open waters and/or transition areas, who intends to engage in a regulated activity. It is impossible for the Department to estimate the exact number of small businesses that own property that will be affected by the proposed amendments.

The Department has determined that the proposed amendments will not impose additional reporting or recordkeeping requirements on small businesses. The proposed

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amendments may impose some additional compliance requirements on small businesses along with the rest of the regulated community, in that they may somewhat increase the number of properties that are subject to requirements concerning protection of threatened or endangered wildlife species. However, the rules regulate based on environmental impacts and will generally have the same impact on a small business as on any other person. Because the values and functions of wetlands are important to all persons, and these proposed amendments are necessary to maintain appropriate freshwater wetlands protection and to retain assumption of the Federal 404 program, no lesser requirements for small businesses are provided.

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Full text of the proposed amendments follows (additions indicated in boldface thus; deletions indicated in brackets [thus]).

## N.J.A.C. 7:7 COASTAL PERMIT PROGRAM RULES

### SUBCHAPTER 1 GENERAL PROVISIONS

#### 7:7-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

. . .

"Property as a whole" means all property assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one investment or development plan.

. . .

#### 7:7-1.10 Construction and relaxation of procedures or standards

(a) This chapter shall be liberally construed to effectuate the purpose of the Acts under which it was adopted.

(b) The Department may, in its discretion and if consistent with statutory requirements, relax the application of any of the procedures in this chapter when necessary and in the public interest.

(c) In making any permit decision under this chapter, the Department may relax the application of one or more of the substantive standards in the rules on Coastal Zone Management at N.J.A.C. 7:7E if an extraordinary hardship is deemed to exist under (d) below, or if a court determines that the issuance, modification, or denial of a coastal permit would constitute a taking of property without just compensation. The Department may relax a substantive standard of N.J.A.C. 7:7E under this subsection in response to a request for such relaxation, or on its own initiative. [The Department may relax the application of the standards in N.J.A.C. 7:7E only if the applicant demonstrates that an extraordinary hardship exists.] However, the Department shall not relax a substantive standard of N.J.A.C. 7:7E under this subsection until after the Department renders a decision on the permit application under the rules as strictly applied.

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(d) For the purposes of (c) above, an [An] extraordinary hardship is deemed to exist only if [the applicant demonstrates to the Department's satisfaction that] both of the following criteria are met:

1. The strict application of any standard(s) in N.J.A.C. 7:7E would prevent a property owner from realizing a minimum beneficial economically viable use of his or her property as a whole, in accordance with constitutional standards, and this does not result from an action or inaction of that property owner or an entity controlled by that property owner [. For the purposes of this paragraph, the property as a whole is all property that was assembled as one investment or to further one development plan, and may include more than one municipal tax lot. The property as a whole may also include lots that were previously sold or developed, if those lots were part of one investment or one development plan]; and
- ~~[2. The proposed use minimizes impacts to the Special Areas described at N.J.A.C. 7:7E-3 to the maximum extent practicable;~~
- ~~3. The proposed use will not jeopardize a threatened or endangered species;]~~
- ~~[4.] 2. The property has been offered for sale as required under [(e)4] (j)5 below and the Department has determined that no reasonable offer to purchase has been received. [;]~~
- ~~[5. The proposed use will not substantially impair coastal resources;~~
- ~~6. The proposed use is the minimum relief necessary to enable the property owner to realize a minimum beneficial use of the property as a whole, consistent with constitutional standards; and~~
- ~~7. Any part of the subject property that the Department does not allow to be developed through relaxation of the substantive standards of N.J.A.C. 7:7E under this subsection shall be protected from any future development by a recorded conservation restriction to prohibit its use in the future for regulated activities.~~

~~(e) An applicant may request a relaxation of a substantive standard(s) in N.J.A.C. 7:7E under (c) above either:~~

- ~~1. At the same time that the applicant submits a permit application. However, the Department will not make a decision on the request until after the Department renders a decision on the permit application; or~~
- ~~2. After receiving notice of a Department decision on a permit application. Unless the Department grants an extension of time for submitting such a request, the applicant shall submit a request for relaxation of N.J.A.C. 7:7E standards within the time frame set forth in N.J.A.C. 7:7-5.1(a) for an adjudicatory hearing request.]~~

(e) In making the determination to relax a substantive standard of N.J.A.C. 7:7E as provided at (c) above, the Department shall consider, at a minimum, the following:

1. Whether the investments the property owner made in the property that is the subject of the coastal permit application were reasonable, in accordance with (f) below;



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2. The possible economically viable uses of the property, in accordance with (g) below; and
  3. The possible environmental impacts of any economically viable uses for the property, and their consistency with the goals of CAFRA, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., in accordance with (h) below.

(f) In determining whether the property owner's investments in the property as a whole were reasonable, the Department shall apply the following criteria:

1. The investments in the property shall include only costs actually incurred in pursuit of development of the property;
2. The investments shall have been made in furtherance of a lawful action. For example, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for this violation would not constitute a reasonable investment;
3. The investments in the property shall include only costs relating to the specific property as a whole that is the subject of the coastal permit application, and shall not include costs related to other properties;
4. The investments shall be reasonable in light of conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, in light of all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought land containing a dune that is regulated under this chapter, it would not be reasonable to assume that the property could be developed without constraints. In determining whether an investment was reasonable, the Department shall consider, at a minimum, the following:
  - i. Existing zoning and other regulatory requirements and conditions;
  - ii. Historic landmarks or other historic or cultural resources;
  - iii. The likelihood of obtaining other necessary approvals such as wastewater treatment approvals;
  - iv. Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;
  - v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity;
  - vi. Land uses on adjacent properties and in the area where the property is located; and
5. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments and/or the proposed use of the property.

(g) In determining the possible economically viable uses of the property, the Department shall consider existing legal precedent regarding what constitutes a minimum beneficial economically viable use, taking into consideration, at a minimum, the following:

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1. A use that would provide the property as a whole with a value that is equal to, or greater than, the property owner's reasonable investment as determined under (f) above shall be presumed to be an economically viable use; and
  2. A use shall not be excluded from consideration as an economically viable use merely because it diminishes the value of the property as a whole, does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all reasonable investments identified under (f) above.

(h) In determining the possible environmental impacts of any economically viable uses of the property and the consistency of those impacts with the goals of CAFRA, N.J.S.A. 13:19-1 et seq., the Waterfront Development Law, N.J.S.A 12:5-1 et seq., and the Wetlands Act of 1970, N.J.S.A. 13:9A-1 et seq., in accordance with (e)3 above, the Department shall consider, at a minimum, whether any economically viable use determined under (g) above would:

1. Reduce the environmental impact of the project to the least impact feasible to coastal resources or to other protected resources such as historic or cultural resources, water quality, ecologically unique areas or critical wildlife habitat;
2. Result in irreversible losses of values and functions provided by coastal resources, and whether such losses could be mitigated;
3. Minimize impacts to the Special Areas described at N.J.A.C. 7:7E-3 to the maximum extent practicable;
4. Jeopardize a threatened or endangered species; or
5. Substantially impair coastal resources.

(i) A property owner may request a relaxation of a substantive standard(s) of N.J.A.C. 7:7E at any of the following times, at the property owner's option. However, the request for relaxation shall not be deemed complete, and the Department shall not act on the request, without the documents required at (j) below, including the documents required at (j)8 below:

1. At the same time that the property owner submits a coastal permit application;
2. After receiving notice of a Department decision on a coastal permit application, made in accordance with the rules as strictly applied;
3. After the Commissioner has issued a final decision concluding contested case proceedings in the Office of Administrative Law;
4. After completion of all appeals of any final decision issued by the Commissioner under (i)3 above; or
5. After a court determination that the issuance, modification, or denial of a coastal permit would result in a taking of property without just compensation.

[(e)] (j) A complete request for the relaxation of N.J.A.C. 7:7E standards under (c) above shall include the following items, unless an item was previously submitted under N.J.A.C. 7:7-4.2(g) and the Department determines that the item is therefore not necessary:

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1. Development plans showing the project that is proposed in order to provide a minimum beneficial economically viable use;
2. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7-1.3, was acquired and the purchase price of the property as a whole ;
3. Document(s) showing [and] the amount and nature and date of any [other expenditures] investments made to maintain and/or develop the property as a whole, other than the purchase price;
- [3.] 4. The language of a proposed conservation restriction that meets the requirements of [(c)7 above] (m)2 below;
- [4.] 5. Documentation that the property has been offered for sale, in a letter whose form is provided by the Department, [via certified mail, at a fair market value,] to all owners of [real] property within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and governmental agencies on a list supplied by the Department. [The applicant shall submit any response it receives to the offer for sale to the Department within 15 days of receipt by the applicant.] This documentation shall include the following:
  - i. A copy of each letter that the property owner sends under this subsection;
  - ii. All responses the property owner receives to the letters sent under this subsection. Each response shall be submitted to the Department within 15 days after the property owner's receipt of the response; and
  - iii. A list, certified by the municipality, of all owners of real property within 200 feet of the property as a whole, including owners of easements as shown on the tax duplicate;
6. The written offer of sale required under (j)5 above shall be sent by certified mail and shall:
  - i. Indicate that the offer is open for a period of at least [180] 60 calendar days;
  - ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial economically viable use of the property would be allowed;
  - iii. [If applicable, include] Include full disclosure [that the property is comprised] of the location on the property of any of the Special Areas described at N.J.A.C. 7:7E-3; and
  - iv. Indicate that a relaxation of N.J.A.C. 7:7E standards to avoid extraordinary hardship and allow development of the property has been requested under this section; and
- [5.] 7. Document(s) and a detailed narrative demonstrating [compliance with (c)] an extraordinary hardship in accordance with (d) above, or a copy of a court determination that the Department's issuance, modification, or denial of a coastal permit would constitute a taking of property without just compensation;
8. Documents showing that the property owner has concluded all appeals of the Department's decision on the application for a coastal permit. Such documentation shall include the last of the following (submitted after the appeal period for the applicable decision has expired):
  - i. A Department decision on the coastal permit application, made in accordance with the rules as strictly applied;

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- ii. A final decision issued by the Commissioner at the conclusion of contested case proceedings in the Office of Administrative Law regarding the Department's decision on the coastal permit application; or
  - iii. Documentation that all appeals of any final decision issued by the Commissioner under (j)8ii above have been concluded.

(k) The Department shall take action on a request for relaxation of N.J.A.C. 7:7E standards no later than 90 days after receiving a complete request that meets all requirements at (j) above.

(l) If a relaxation of the substantive standards of N.J.A.C. 7:7E is initiated by the Department rather than by the property owner, the Department shall provide public notice as follows:

- 1. Notice of the development that the Department proposes to allow under the relaxation shall be provided in the same manner that the Department would provide notice of a potential settlement under N.J.A.C. 7:7-5.4; and
- 2. Notice of a final determination to relax a substantive standard under this subsection shall be provided in the same manner that the Department would provide notice of a settlement under N.J.A.C. 7:7-5.4.

(m) If the Department allows development through relaxation of the substantive standards of N.J.A.C. 7:7E under (c) above, the resulting approval shall, at a minimum:

- 1. Be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards; and
- 2. Ensure that any part of the property as a whole that the Department does not allow to be developed through relaxation of the substantive standards of N.J.A.C. 7:7E under (c) above will be protected from future development by a recorded conservation restriction.

## SUBCHAPTER 4 PERMIT REVIEW PROCEDURE

### 7:7-4.2 Application contents

(a) - (f) No change.

(g) To ensure that the Department can thoroughly evaluate alternatives to a development, an application for development that proposes filling under N.J.A.C. 7:7E-4.2(j), or regulated activities within any of the special areas listed at (g)1 through 8 below, shall include the information required at (h) below:

- 1. Wetlands, N.J.A.C. 7:7E-3.27;
- 2. Surf clam areas, N.J.A.C. 7:7E-3.3;
- 3. Submerged vegetation habitat, N.J.A.C. 7:7E-3.6;

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4. Dunes, N.J.A.C. 7:7E-3.16;
5. Overwash areas, N.J.A.C. 7:7E-3.17;
6. Beaches, N.J.A.C. 7:7E-3.22;
7. Historic and archaeological resources, N.J.A.C. 7:7E-3.36; and
8. Critical wildlife habitats, N.J.A.C. 7:7E-3.39.

(h) An application for development that is described at (g) above shall include information regarding the acquisition history of the property as a whole, as defined at N.J.A.C. 7:7-1.3, and the nature and degree of investment that the applicant has made in the project site. This information shall include:

1. A description of all alternatives considered, including offsite alternatives as well as onsite alternatives that could minimize environmental impacts on the site, and the reasons for rejecting each alternative;
2. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7-1.3, was acquired and the purchase price of the property as a whole;
3. Document(s) showing the amount, nature, and date of any investments made to maintain and/or develop the property as a whole, other than the purchase price;
4. Documentation that the property has been offered for sale, in a letter whose form is provided by the Department, to all owners of property within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and governmental agencies on a list supplied by the Department. This documentation shall include the following:
  - i. A copy of each letter that the property owner sends under this subsection;
  - ii. All responses the property owner receives to the letters sent under this subsection. Each response shall be submitted to the Department within 15 days after the property owner's receipt of the response; and
  - iii. A list, certified by the municipality, of all owners of real property within 200 feet of the property as a whole, including owners of easements as shown on the tax duplicate; and
5. The written offer of sale required under (g)4 above shall be sent by certified mail and shall:
  - i. Indicate that the offer is open for a period of at least 60 calendar days;
  - ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial economically viable use of the property would be allowed;
  - iii. Include full disclosure of the location on the property of any of the Special Areas described at N.J.A.C. 7:7E-3; and
  - iv. Indicate that the property owner has applied for a coastal permit and that if a court determines that the denial of that application would result in a taking of the property without compensation, the Department may modify its action to allow development of the property.

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## N.J.A.C. 7:7A FRESHWATER WETLANDS PROTECTION ACT RULES

### SUBCHAPTER 1 GENERAL INFORMATION

#### 7:7A-1.4 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise. Additional definitions specifically applicable to N.J.A.C. 7:7A-15, Mitigation, are set forth at N.J.A.C. 7:7A-15.1.

...

"Property as a whole" means all property assembled as one investment or to further one development plan. The property as a whole may include more than one municipal tax block or lot. The property as a whole may also include blocks or lots that were previously sold or developed, if those blocks or lots and the remaining unsold or undeveloped blocks or lots were part of one investment or development plan.

...

#### 7:7A-1.8 Determination of a taking of property

(a) If the issuance, modification, or denial of a freshwater wetlands permit would constitute a taking of property without just compensation, the Department may do any of the following:

1. Compensate the property owner for the lost value;
2. Condemn the affected property pursuant to the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 et seq.; or
3. Modify its action or inaction concerning the permit so as to minimize the detrimental effect to the value of the property. Such modification may include the relaxation of substantive requirements of this chapter in order to allow a development that would afford a minimum beneficial economically viable use of a property.

(b) In determining whether to modify its action or inaction concerning a permit under (a)3 above, and the extent of any such modification, the Department shall consider the following:

1. Whether the investments the property owner made in the property that is the subject of the freshwater wetlands permit application were reasonable, in accordance with (c) below;
2. The possible economically viable uses of the property, in accordance with (d) below; and
3. The possible environmental impacts of any economically viable uses for the property, and their consistency with the goals of the FWPA, in accordance with (e) below.

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(c) In determining whether the property owner's investments in the property as a whole were reasonable, the Department shall apply the following criteria:

1. The investments in the property shall include only costs actually incurred in pursuit of development of the property;
2. The investments shall have been made in furtherance of a lawful action. For example, if the property owner began the project without the necessary permits, the cost of defending against an enforcement action for this violation would not constitute a reasonable investment;
3. The investments in the property shall include only costs relating to the specific property as a whole that is the subject of the freshwater wetlands permit application, and shall not include costs related to other properties;
4. The investments shall be reasonable in light of conditions at the time of the investment. That is, the investment shall have been made in pursuit of development that would likely have been legally and practically possible on the property, in light of all constraints existing and reasonably ascertainable at the time of the investment. For example, if a property owner bought freshwater wetlands regulated under this chapter, it would not be reasonable to assume that the property could be developed without constraints. In determining whether an investment was reasonable, the Department shall consider, at a minimum, the following:
  - i. Existing zoning and other regulatory requirements and conditions;
  - ii. Historic landmarks or other historic or cultural resources;
  - iii. The likelihood of obtaining other necessary approvals such as wastewater treatment approvals;
  - iv. Terrain and other site conditions, and/or environmental constraints, which could affect the potential uses of the property as a whole;
  - v. The existence of, or likelihood of obtaining, services to the property such as sewers or electricity;
  - vi. Land uses on adjacent properties and in the area where the property is located; and
5. Any other factor affecting the property or the property owner, which is related to the reasonableness of the investments and/or the proposed use of the property.

(d) In determining the possible economically viable uses of the property, the Department shall consider existing legal precedent regarding what constitutes a minimum beneficial economically viable use, taking into consideration, at a minimum, the following:

1. A use that would provide the property as a whole with a value that is equal to, or greater than, the property owner's reasonable investment as determined under (c) above shall be presumed to be an economically viable use; and
2. A use shall not be excluded from consideration as an economically viable use merely because it diminishes the value of the property as a whole, does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all reasonable investments identified under (c) above.

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(e) In determining the possible environmental impacts of any economically viable uses of the property and the consistency of those impacts with the goals of the FWPA, in accordance with (b)3 above, the Department shall consider, at a minimum, the following:

1. The quality and resource value classification pursuant to N.J.A.C. 7:7A-2.5 of the wetland which may be affected, and the amount of freshwater wetlands, transition areas, and/or State open waters to be disturbed;
2. Whether and to what extent the use would adversely affect freshwater wetlands, transition areas, and/or State open waters; or other protected resources, for example, historic or cultural resources, ecologically unique areas or critical wildlife habitat;
3. The functions and values provided by the freshwater wetlands, transition areas, and/or State open waters to be disturbed, for example, providing flood control or wildlife habitat, or improving water quality;
4. Whether the use would result in irreversible losses of values and functions provided by freshwater wetlands, transition areas, and/or State open waters, and whether such losses could be mitigated;
5. Whether the environmental impact of the use would be the least impact feasible to freshwater wetlands, transition areas, and/or State open waters; or to other protected resources; and
6. The probable individual and cumulative impacts of the regulated activity on public health and fish and wildlife.

(f) A property owner may request that the Department modify its action or inaction concerning a permit under (a)3 above at any of the following times, at the property owner's option:

1. At the same time that the property owner submits an application for an individual freshwater wetlands permit or individual transition area waiver. However, the Department shall not make a decision on whether to modify its action or inaction concerning a permit until after the Department renders a decision on the permit or waiver application under this chapter as strictly applied;
2. After receiving notice of a Department decision on an application for an individual freshwater wetlands permit or individual transition area waiver;
3. After the Commissioner has issued a final decision concluding contested case proceedings in the Office of Administrative Law; or
4. After a court determination that the issuance, modification, or denial of an individual freshwater wetlands permit or individual transition area waiver would result in a taking of property without just compensation.

(g) A request for the Department to modify its action or inaction concerning a permit under (a)3 above shall include the following items, unless an item was previously submitted under N.J.A.C. 7:7A-10.6(b) and the Department determines that the item is therefore not necessary:



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1. Document(s) showing when the property as a whole , as defined at N.J.A.C. 7:7A-1.4, was acquired and the purchase price of the property as a whole;
  2. Document(s) showing the amount, nature, and date of any investments made to maintain and/or develop the property as a whole, other than the purchase price;
  3. The language of a proposed conservation restriction that meets the requirements of (j)2 below;
  4. Documentation that the property has been offered for sale, in a letter whose form is provided by the Department, to all owners of property within 200 feet of the property as a whole, and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department. This documentation shall include the following:
    - i. A copy of each letter that the property owner sends under this subsection;
    - ii. All responses the property owner receives to the letters sent under this subsection. Each response shall be submitted to the Department within 15 days after the property owner's receipt of the response; and
    - iii. A list, certified by the municipality, of all owners of real property within 200 feet of the property as a whole, including owners of easements as shown on the tax duplicate;
  5. The written offer of sale required under (g)4 above shall be sent by certified mail and shall:
    - i. Indicate that the offer is open for a period of at least 60 calendar days;
    - ii. Include a copy of a fair market value appraisal, performed by a State-licensed appraiser, that assumes that a minimum beneficial economically viable use of the property will be allowed;
    - iii. Include full disclosure of the location on the property of any freshwater wetlands, transition areas, and/or State open waters; and
    - iv. Indicate that the property owner has applied for an individual freshwater wetlands permit or transition area waiver, that denial of that application could result in a taking of the property without compensation, and that if the denial would result in a taking the Department might modify its action to allow development of the property; and
  6. A development plan showing the project that is proposed in order to provide a minimum beneficial economically viable use;
  7. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands, transition areas, and/or State open waters;
  8. Documentation that the proposed project will cause the least environmental impact possible, while still providing a minimum beneficial economically viable use of the property consistent with constitutional standards;
  9. If the request is based on a court determination that the Department's action or inaction concerning the permit would constitute a taking without just compensation, a copy of the court decision; and
  10. Documents showing that the property owner has concluded all appeals of the Department's decision on the application for an individual freshwater wetlands permit or transition area waiver. Such documentation shall include the last of the

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following (submitted after the appeal period for the applicable decision has expired):

- i. A Department decision on the application for an individual freshwater wetlands permit or transition area waiver, made in accordance with the rules as strictly applied;
- ii. A final decision issued by the Commissioner at the conclusion of contested case proceedings in the Office of Administrative Law regarding the Department's decision on the application for an individual freshwater wetlands permit or transition area waiver; or
- iii. Documentation that all appeals of any final decision issued by the Commissioner under (g)10ii above have been concluded.

(h) The Department may modify its action or inaction concerning a permit under (a)3 above in response to a request from a property owner, or on its own initiative. If a request for such modification is submitted, the Department shall render a decision on the request no later than 90 days after receiving a complete request that meets all requirements at (g) above.

(i) If the modification of a Department action or inaction concerning a permit under (a)3 above is initiated by the Department rather than by the property owner, the Department shall provide public notice as follows:

1. Notice of the minimum beneficial economically viable use that the Department proposes to allow shall be provided in the same manner that the Department would provide notice of a potential settlement under N.J.A.C. 7:7A-1.7(h)2; and
2. Notice of a determination to approve a minimum beneficial economically viable use shall be provided in the same manner that the Department would provide notice of a settlement under N.J.A.C. 7:7A-1.7(h)4.

(j) If the Department modifies its action or inaction concerning a permit under (a)3 above, the resulting approval shall, at a minimum:

1. Be the minimum relief necessary to enable the property owner to realize a minimum beneficial economically viable use of the property as a whole, consistent with constitutional standards; and
2. Ensure that any part of the property as a whole that the Department does not allow to be developed through modifying its action or inaction concerning a permit under (a)3 above will be protected from future development by a recorded conservation restriction.

## SUBCHAPTER 2 APPLICABILITY

### 7:7A-2.4 Classification of freshwater wetlands by resource value

(a) - (b) No change.

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(c) The Department identifies present or documented habitat for threatened or endangered species for purposes of (b) above using the Landscape Project method, which focuses on habitat areas required to support local populations of threatened or endangered wildlife species. The details of this method are described in the Land Use Regulation Program's freshwater wetlands technical manual, available from the Department's Office of Maps and Publications at the address in N.J.A.C. 7:7A-1.3. An applicant may request that a documented habitat not result in the classification of a freshwater wetland as a freshwater wetland of exceptional resource value. Such a request shall include a demonstration of the long-term loss of one or more habitat requirements of the specific documented threatened or endangered species, including, but not limited to, wetlands size or overall habitat size, water quality, or vegetation density or diversity. Upon such a request, the Department shall review all available information, and shall make a final classification of the wetland.

(d) - (g) No change.

## SUBCHAPTER 7 INDIVIDUAL FRESHWATER WETLANDS AND OPEN WATER FILL PERMITS

### 7:7A-7.2 Standard requirements for all individual permits

(a) (No change.)

(b) The Department shall issue an individual freshwater wetlands or open water fill permit only if the regulated activity:

1. - 11. (No change.)
12. Is in the public interest, as determined by the Department in consideration of the following:
  - i. - vi. (No change.)
  - [viii. The Department's evaluation of whether denial of the permit could result in a taking in accordance with N.J.A.C. 7:7A-7.3;]
13. - 14. (No change.)

(c) The following shall apply to the Department's consideration of whether an alternative is practicable under (b)1 above[, or under N.J.A.C. 7:7A 7:7A-7.3(b)]:

1. An alternative shall be practicable if it is available and capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes; [and]
2. An alternative shall not be excluded from consideration under this provision merely because it includes or requires an area not owned by the applicant which could reasonably have been or be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity[.] ; and
3. In considering cost in accordance with (c)1 above, the Department shall consider the acquisition history of the property as a whole, as defined at N.J.A.C. 7:7A-1.4, and the amount, nature, and date of investments that the applicant has made in the property as a whole.

~~[7:7A-7.3 Taking without compensation~~

~~(a) In determining whether a project is in the public interest pursuant to N.J.S.A. 13:9B-11 and N.J.A.C. 7:7A-7.2(b)12, the Department may, upon request of an applicant, evaluate whether denial of a permit could result in a taking of property without compensation.~~

~~(b) An application for an individual permit shall meet all applicable application requirements at N.J.A.C. 7:7A-10, including the requirement at N.J.A.C. 7:7A-10.6 for an alternatives analysis that meets the requirements at N.J.A.C. 7:7A-7.2. While an applicant may choose to also include in the application a takings assertion and information to support that assertion, the Department shall not accept the application as administratively complete if it includes only the takings information and does not include all other required application information, including the alternatives analysis.~~

~~(c) An applicant who asserts that the denial of a permit could result in a taking of property without compensation, and who wishes the Department to evaluate this assertion in making the determination in (a) above shall demonstrate that:~~

- ~~1. Denial of the permit would prevent the property owner from realizing a minimum beneficial use of the property as a whole, in accordance with constitutional standards; and~~
- ~~2. The inability to realize a minimum beneficial use under (c)1 above does not result from any action or inaction of the property owner or an entity controlled by the property owner.~~

~~(d) For the purposes of this section, the property as a whole is all property that was assembled as one investment or to further one development plan, and may include more than one municipal tax lot. The property as a whole may also include lots that were previously sold or developed, if those lots were part of one investment or development plan.~~

~~(e) To obtain an evaluation of whether the denial of a permit could constitute a taking of property without compensation as part of a determination of whether a project is in the public interest under (a) above, the applicant shall submit, at a minimum, the following information, in addition to the application requirements at N.J.A.C. 7:7A-10:~~

- ~~1. Documentation showing when the property as a whole was acquired by the current property owner and for what consideration;~~
- ~~2. Documentation showing the amount, nature, date and reasonableness of any expenditures made to maintain and/or develop the property as a whole;~~
- ~~3. Documentation that the property has been offered for sale, through a letter whose form is provided by the Department, to all owners of property within 200 feet and to the land conservancies, environmental organizations, and government agencies on a list supplied by the Department. The applicant shall~~

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- ~~submit to the Department any response it receives to the offer for sale within 15 days of the applicant's receipt of the response;~~
- ~~4. The written offer of sale required under (e)3 above shall be sent by certified mail and shall:~~
- ~~i. Indicate that the offer is open for a period of at least 180 calendar days;~~
  - ~~ii. Include a copy of a fair market value appraisal, performed by a State licensed appraiser, that assumes that a minimum beneficial use of the property will be allowed;~~
  - ~~iii. Include full disclosure of the location on the property of any freshwater wetlands, transition areas, and/or State open waters; and~~
  - ~~iv. Indicate that the property owner has applied for an individual freshwater wetlands permit and has asserted that the denial of that application will result in a taking of the property without compensation;~~
- ~~5. A mitigation proposal that complies with N.J.A.C. 7:7A-15, to offset the impacts of the project on freshwater wetlands, transition areas, and/or State open waters;~~
- ~~6. Documentation that the proposed project will cause the least environmental impact possible, while still providing a minimum beneficial use of the property consistent with constitutional standards; and~~
- ~~7. Documentation that the proposed project meets the standards at N.J.S.A. 13:9B-9(b)(3) through (9) and at N.J.A.C. 7:7A-7.2(b)2 through 12.]~~

## SUBCHAPTER 10 APPLICATION CONTENTS AND PROCEDURE

### 7:7A-10.5 Additional application requirements for an individual transition area waiver

(a) (No change.)

(b) In addition to the information required at (a) above, the application checklist for a hardship transition area waiver under N.J.A.C. 7:7A-6.5 shall require the information required for an individual freshwater wetlands permit application at N.J.A.C. 7:7A-10.6(b).

### 7:7A-10.6 Additional application requirements for an individual freshwater wetlands or open water fill permit

(a) In addition to the basic information required for all applications in N.J.A.C. 7:7A-10.2, the application checklist for an individual freshwater wetlands or open water fill permit shall require the following information:

1. - 6. (No change.)
7. An alternatives analysis that [allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-7.2 are met, including:
  - i. A description of all other alternatives considered and the reasons for rejecting them; and

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- ii. A description of onsite alternatives considered in order to minimize impacts on the site.] meets the requirements at (b) below.

(b) To ensure that the Department can evaluate all potential alternatives to a proposed project, the application checklist for an individual freshwater wetlands permit shall require an alternatives analysis that allows the Department to evaluate whether the requirements of N.J.A.C. 7:7A-7.2 are met, including, at a minimum the following:

1. A description of all alternatives considered, including offsite alternatives as well as onsite alternatives that could minimize environmental impacts on the site, and the reasons for rejecting each alternative;
2. Information regarding the history of the property as a whole, as necessary to evaluate the cost to the property owner of various alternatives. Such information may include:
  - i. Document(s) showing when the property as a whole, as defined at N.J.A.C. 7:7A-1.4, was acquired and its purchase price;
  - ii. Documentation of any investments made to maintain and/or develop the property as a whole;
  - iii. Documentation of attempts by the property owner to sell the property or to obtain other property; and
3. Documentation of the environmental impacts of the proposed project, and of ways to minimize those impacts.

Based on consultation with staff, I hereby certify that the above statements, including the Federal Standards Analysis addressing the requirements of Executive Order 27 (1994) (p. 19), permit the public to understand accurately and plainly the purpose and expected consequences of these proposed amendments, I hereby authorize this proposal.

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Date

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ROBERT C. SHINN, JR.  
Commissioner